

OPINION
62-121

August 16, 1962 (OPINION)

ELECTIONS

RE: Petitions - Vacancy on Ballot by Reason of Death

This is in response to your letter of August 13, 1962, in which you state that the incumbent county commissioner and another candidate were nominated in the primary election as candidates for the office of county commissioner in the general election.

The incumbent commissioner died and it now appears that a vacancy exists. The candidate that opposed the incumbent in the primary election having been nominated, his name will be printed on the no-party ballot in the general election. You also advise there are being circulated two petitions by two candidates to fill the vacancy created by the death of the incumbent commissioner, who was nominated in the primary election. You then ask for our opinion on the following question:

If the two other candidates obtain the necessary signers to their petition and file said petitions at the proper time, can both their names be printed on the ballot?"

Section 16-08-07 of the North Dakota Century Code, as is material here, provides as follows:

* * *

Whenever a vacancy shall exist on a no-party ballot in a county or district within a county, such vacancy may be filled by filing with the county auditor at least thirty days prior to the general election a written petition as provided in Section 16-04-04, stating that the petitioner desires to become a candidate for election to the office for which a vacancy exists. The petition for the nomination of any person to fill such vacancy shall be signed by qualified electors equal in number to at least thirty percent of the total vote cast for governor at the preceding general election in the county or district.

A vacancy in the no-party ballot shall be deemed to exist when a candidate nominated at the primary election shall die, resign, or otherwise become disqualified to have his name printed on the ballot at the general election."

This statute defines what constitutes a vacancy. Death of a candidate nominated at the primary election constitutes a vacancy.

The legislative history of the above section indicates that it was initially enacted in 1931 by Chapter 137 of the 1931 Session Laws. It initially contained the following language:

Provided, however, that no vacancy shall be deemed to exist under the provisions of this act if there is a candidate or candidates in number equal to the number of officers to be elected for such office."

It is also observed that the act initially provided that the petition to fill such vacancy had to comply generally with the requirements for securing signatures and filing petitions in the primary election. These provisions were later eliminated in 1939 by Chapter 138 of the 1939 Session Laws. Chapter 138 also provided that the petition for nomination to fill a vacancy must be signed by a least twenty percent of the voters of such county or district. This provision was subsequently changed to thirty percent of the total votes cast for Governor at the preceding general election in the county or district (Chapter 152, 1951 Session Laws.) This is substantially the form in which the present statute exists.

Under the present statute, the petition is to be in the form as prescribed in section 16-04-04 of the North Dakota Century Code. The number of candidates to fill the vacancy is not limited. The signatures of qualified electors needed on a petition to fill such vacancy is indicative of imposing the only limitation. The signatures of thirty percent of the qualified electors are required. Title 16 also provides that an elector may sign only one petition for the same office. Thus, in effect, any person may become a candidate if he obtains signatures of thirty percent of the qualified electors of the votes cast for Governor at the preceding general election. This requirement limits, to some degree, the number of candidates that may fulfill this requirement and thus be eligible to fill the vacancy. There appears to be no other limitation. It would be grossly unjust and unfair to conclude that the candidate who first obtains the necessary signatures, being qualified otherwise, will be permitted to fill the vacancy and all others will be denied the right to have their names placed on the ballot.

Therefore, in direct response to your question, it is our opinion that if the two candidates obtain the necessary signers on their petitions and file said petitions at the proper time, and are otherwise qualified, they are both entitled to have their names printed on the ballot in the general election.

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